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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Utility Choice, LLC

Serial No. 76312652

Michael R. Schulman and John D. Wiseman of Locke Liddell & Sapp LLP for Utility Choice, LLC.

Steven Foster, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Cissel, Hairston and Drost, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Utility Choice, LLC to register the mark UTILITY CHOICE ELECTRIC (UTILITY and ELECTRIC are disclaimed) for "utility services, namely, transmission of electricity to end-use customers."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the

[1] Serial No. 76312652 filed September 12, 2001, and asserting a bona fide intention to use the mark in commerce.

ground that applicant's mark so resembles the mark MY UTLITY OF CHOICE (UTILITY is disclaimed), previously registered for "utility services, namely, the transmission of electricity,"[2] that if used in connection with applicant's identified services, it is likely to cause confusion, mistake or deception.

Applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities and the dissimilarities between the services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Initially, we note that applicant does not dispute that its services and registrant's services are identical. Thus, both applicant and the Examining Attorney have directed their arguments to whether the marks are similar

[2] Registration No. 2,206,681 on the Principal Register issued on December 1, 1998.

of dissimilar and the scope of protection to be afforded registrant's mark.

Applicant argues that the marks UTILITY CHOICE ELECTRIC and MY UTITLITY OF CHOICE are different in sound and appearance and points to the fact that its mark consists of three words and eight syllables, whereas the registrant's mark consists of four words and seven syllables. With respect to the connotation of the marks, applicant maintains that registrant's mark MY UTILITY OF CHOICE is clearly a slogan that conveys the message that registrant is "my utility company; this is the utility company that I have selected and prefer"; whereas applicant's mark UTILITY CHOICE ELECTRIC conveys the message that "you have the freedom to choose; we provide an option of high quality electricity." (Brief, pp. 4-5). Further, applicant argues that registrant's mark MY UTILITY OF CHOICE is laudatory in nature and therefore is entitled to only a limited scope of protection.

The Examining Attorney, on the other hand, argues that applicant's mark UTILITY CHOICE ELECTRIC is substantially similar in overall commercial impression to registrant's mark MY UTILITY OF CHOICE, and that notwithstanding any alleged weakness in registrant's mark, it is still entitled to protection from the registration of applicant's mark.

It is a well-established principle that when marks appear on identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We find that the marks MY UTILITY OF CHOICE and ULTILITY CHOICE ELECTRIC are sufficiently similar in sound appearance, connotation and overall commercial impression that if applicant were to use the mark it seeks to register, confusion would be likely to occur. The marks are similar in sound and appearance because each is dominated by the words UTILITY and CHOICE, in that order. Although each mark contains other wording, this fact is not sufficient to avoid a likelihood of confusion. When the marks are viewed in their entireties, they have, in addition to the similarities in appearance and pronunciation, a strong similarity in connotation, namely, that the electric services rendered there under are preferred or preferable to others. In this regard, we judicially notice the definition of the word "**choice**"

submitted with the Examining Attorney's brief:

> **choice**: something that is preferred or preferable to others; the best part of something.[3]

Although there may be subtle differences in the meanings of the marks when they are subjected to close scrutiny, we do not believe that consumers will undertake such an analysis. The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Further, when evaluating similarities between marks, the emphasis must be on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks.

We recognize that registrant's mark MY UTILITY OF CHOICE has some laudatory significance as applied to electric services. However, even weak marks are entitled to protection against registration by a subsequent user of the same or a similar mark for the same or closely related services. See Hollister Incorporated v. Ident A Pet, 193 USPQ 439 (TTAB 1976). In finding that the marks are

[3] The Random House Webster's Unabridged Dictionary (2d ed. 1998).

similar, another factor we have considered is that the record is devoid of any evidence of third-party uses of marks that include the words UTILITY and CHOICE for electric or other utility services.

With respect to applicant's contention that electric services are purchased only after careful consideration, applicant has offered no support for this contention. Moreover, it is common knowledge that electric services are purchased by ordinary consumers who are not immune from source confusion when two marks are quite similar.

Finally, to the extent that any of applicant's contentions raises doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the registrant and prior user. See In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F2d. 918, 179 USPQ 729 (CCPA 1973).

We conclude that consumers familiar with registrant's electric services offered under its mark MY UTILITY OF CHOICE would be likely to believe, upon encountering applicant's mark UTILITY CHOICE ELECTRIC for identical services, that the respective services originated with or were somehow associated with or sponsored by the same entity.

Decision: The refusal to register under Section 2(d) is affirmed.